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No. 483

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE CALLINAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK, APPELLANT

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY, A PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered on September 15, 1952, by a specially-constituted three-judge district court convened pursuant to 28 U.S.C. 1253, 2284, and 2325, dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission. Appeal was allowed on November 7, 1952, and the appeal papers were served on November 10, 1952.

The order of the Commission which is attacked in this proceeding required appellant to cancel certain rates, charges and allowances to the extent

that they cover towage service, upon the ground that such rates, etc., were published without authority and hence are unlawful since the certificate of public convenience and necessity held by appellant does not permit it to render towage service. There is no dispute over the underlying facts, which are set forth fully both in the report of the Commission (*Joseph R. Hutton Contract Carrier Application*, 285 I.C.C. 75) and in the district court's opinion (107 F. Supp. 184).

Appellant's certificate of operating authority is derived from a certificate issued to one Joseph R. Hutton. Following the enactment in 1940 of Part III of the Interstate Commerce Act providing for regulation of water carriers, Hutton applied for a certificate of public convenience and necessity based upon the "grandfather" provisions of Section 309(a) of the Act, 49 U.S.C. 909(a), and in July 1942 the Commission granted him a certificate (250 I.C.C. 804). The Commission found that on the critical date, January 1, 1940, Hutton was operating as a common carrier by water in the transportation of commodities generally between points in New York Harbor and Hudson River points; and that he used for these operations a steam-power boat and four barges, all operated as a unit (285 I.C.C. 75, 76).

Subsequently the Commission on its own motion reopened Hutton's application and in March 1944 issued an amended certificate which superseded and cancelled Hutton's prior certificate (260 I.C.C. 804). The Commission's report stated that the reason for this action was to define Hutton's operating rights so that he would not be free to

"perform services different from those performed by him on and since the statutory date" (107 F. Supp. 184, 186). The district court observed that "Hutton accepted the new certificate apparently without any question and certainly without any formal objection, either within the time permitted or otherwise" (*ibid.*).

The change in Hutton's certificate was designed to confine him to the service of "freighting" which he had performed on and after the statutory period, i. e., transporting goods by means of towed barges or scows, as distinguished from "towage," i.e., towing barges or scows furnished by a shipper and loaded with his goods and returning the scows empty to point of origin. Under the Commission's rulings, this "is a distinct type of service or field of operation," and, since many carriers performed during the "grandfather period" either only freighting or only towage, to ignore the distinction between them would permit carriers which had engaged in only one type of service "to invade the field of" carriers which engaged in only the other type. *Campbell Transportation Company Common Carrier Application*, 260 I.C.C. 107, 109-110; *Dixie Carriers, Inc., Rates and Allowances*, 287 I.C.C. 417, 421-424.

Following Hutton's death in 1945, his operating rights were sold to appellant. In August 1947 the Commission approved this transfer (265 I.C.C. 813), cancelled Hutton's operating certificate, and issued a certificate granting to appellant the same operating rights held by Hutton except to exclude right to operate between certain points in upper New York (285 I.C.C. 75, 77). The Commission's

report noted that appellant had consented to this limitation in the area of its operations, and said that any certificate may be modified "with the holder's consent" (*id.*, 78).

In 1949 appellant filed with the Commission a tariff effective April 17, 1949, naming rates for transporting bricks from various Hudson River points to points in New York Harbor, with a substantial allowance to the shipper if he furnished the scow in which the bricks were loaded and a further allowance if appellant was not required to return the empty scow to point of origin (285 I.C.C. 75, 80). The Cornell Steamboat Company, which has a certificate of public convenience and necessity authorizing it to perform towage service as a common carrier between points in New York Harbor and Hudson River points (see *Cornell Steamboat Co. v. United States*, 321 U.S. 634), complained to the Commission that certain provisions in appellant's tariff contemplated mere towage service not authorized by its certificate (*id.*, 79). After the Commission had informed appellant that its tariff appeared to provide for furnishing towage service, which its certificate did not authorize, appellant filed a petition for determination of its operating rights (*ibid.*).[1] The Commission ruled that appel-

[1] Appellant at the same time filed an application to purchase the Hudson River towage rights of another company and an application under Section 309(c) of the Act for a certificate of public convenience and necessity authorizing it to perform general towage service on the Hudson River. These applications were pending at the time the Commission ruled in the present proceeding. (285 I.C.C. 75, 79-80.)

lant was performing the service of towage not authorized by its certificate and accordingly cancelled the provisions of its tariff to the extent that they covered such service (*id.*, 82). On appellant's suit to set aside the Commission's order, a three-judge district court unanimously upheld the order in an opinion written by Circuit Judge Charles E. Clark.

We submit that in this case the Commission clearly did not partially modify or revoke appellant's certificate of operating authority. All that the contested order does is to bar performance of a kind of service not authorized by appellant's certificate. The certificate, which was issued in 1947, does not specifically authorize service of towage, and the Commission had ruled as early as December 1943 in the *Campbell* case, supra: "Carriers whose certificate or permits do not specifically authorize the performance of towage are without authority to engage in such service." 260 I.C.C. 107, 110. The Commission's order and the present appeal therefore do not raise the first question presented in appellant's jurisdictional statement, namely, whether the Commission has authority under Part III of the Interstate Commerce Act to effect a partial modification or revocation of a certificate issued to a water carrier.

The third question presented in the jurisdictional statement is whether the Interstate Commerce Commission may alter or partially revoke a certificate issued to a water carrier if the changed certificate is accepted by the holder without objection.

Appellant contends that a change in the certificate, even though the holder has not objected thereto, is contrary to the basis of decision in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424. But we submit that this decision has no application here. In the first place, appellant's operating rights are those conferred by the certificate issued to it, and the Commission, by its order in this case, has made no change in these rights. In the second place, even if appellant's operating rights were to be deemed measured by those which its predecessor in interest may have held at one time, the change made in the Hutton certificate in 1945 is not governed by the *Seatrain* decision, first, because, unlike the situation in *Seatrain*, the change merely confined operating authority to the kind of service in which the carrier had been engaged during the "grandfather" period and, second, because the change in certificate was accepted without objection or protest and was acquiesced in by appellant and its predecessor in interest for some six years—1943 to 1949.

The second question presented by the appeal is whether the statute empowers the Commission to specify in certificates issued under Section 309(a) of the Act the type of service which the carrier may render. Appellant relies in this connection upon doubts expressed in the *Seatrain* case as to whether Part III of the Act authorizes the Commission to issue certificates which "regulate the details of the service of water carriers." 329 U.S. at 431-432.

Section 309(a) provides that if a carrier was in bona fide operation as a common carrier by water on January 1, 1940, over the routes with respect to which application is made and has so operated since that time (or if engaged in furnishing seasonal service only was in bona fide operation during the seasonal period "for operations of the character in question"), the Commission shall issue a certificate without requiring proof that public convenience and necessity will be served by "such operation."

Obviously carriers by water do not all perform the same type of service. Some carry only passengers and their baggage, some only freight, some only a particular commodity (see *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236), some (like appellant prior to 1949) only freighting by means of towed vessels, and some (like Cornell Steamboat Co.) only towage. Neither the language nor the purpose of Section 309(a) warrants construing it as meaning that a company which engages in only one type of service on and after the statutory date is entitled to a certificate authorizing any and all types of service. In the *Cornell Steamboat* case, which involved a certificate authorizing a particular type of service, this Court said (321 U.S. at 637) that the Act is designed to "provide for regulation of the rates and services of *competing* interstate water carriers as part of a broad plan of regulation for all types of *competing* interstate transportation facilities". [Italics supplied.] The Court, after noting that Cornell was in active

competition with "other types of interstate water carriers," said (*ibid.*):

> Therefore, if Cornell's *particular method of providing water transportation facilities* for others is not subject to regulation under the Act, it would appear to present an anomalous exception to the Congressional plan for regulation of *competing* transportation activities. [Italics supplied.]

Differentiation between water carriers on the basis of the character of the services which they perform is expressly authorized by the Act. Section 304(c), 49 U.S.C. 904(c) provides:

> The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carriers by water", or "contract carrier by water", *as the special nature of the services performed by such carriers shall* require; * * *.

The Commission in *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, 78, aptly stated the reasons why a certificate based on grandfather rights should grant operating authority for only the type of service in which the carrier had been previously engaged. The Commission said:

> Applicant furnishes transportation by barge, and we will limit his service to that type

of operation. Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to part III of the act.

In the *Campbell, Dixie,* and *Mechling* cases, as well as in other cases, the Commission has recognized the need to classify carriers according to the nature of the services which they rendered in the grandfather period, and to issue certificates authorizing only the type of service so performed, in order to effectuate the Congressional purpose to preserve grandfather rights without permitting expansion of operations into new fields, which would upset the competitive balance existing in 1940 and would effectively nullify the provisions of Section 309(c) that the Commission may grant new operating authority only if it finds that this is required by public convenience and necessity. See *Erie & St. Lawrence Corporation Contract Carrier Application,* 260 I.C.C. 235, 237-238, upholding the decision of Division 4 (250 I.C.C. 767, 780).[2]

[2] If operations on the statutory date so require, a Section 309(a) certificate may authorize a carrier to perform one type

The question in the instant case, whether the Commission may issue a certificate of operating authority limited to the type of service performed during the grandfather period, lies outside the matter given consideration in the *Seatrain* case, whether the Commission may regulate "the details of the service" in a certificate issued to a water carrier.

Appellant's two final contentions are that the Commission failed to comply with Section 8(b) of the Administrative Procedure Act, and that its order is in conflict with Section 314 of the Interstate Commerce Act. The former contention, as the district court observed, "seems to border on the frivolous" (107 F. Supp. 184, 191). The contention based on Section 314 is likewise clearly without merit. The Commission ruled that under the allowances made to shippers in appellant's tariff, it was performing a service of towage which its certificate did not authorize. The Commission's power to prohibit this unauthorized transportation is not affected by the fact that, under Section 314, a carrier engaged in rendering authorized transportation service, may make an allowance to the shipper if he uses in such transportation an instrumentality furnished by the shipper.

For the foregoing reasons, we submit that this appeal presents no substantial question. It is

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of service on particular routes and other types of service on other routes. *Warner* v. *United States*, 97 F. Supp. 580, 582 (W.D. Tenn.), affirmed per curiam 341 U.S. 907.

therefore respectfully submitted that the judgment of the district court should be affirmed.

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Acting Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

November 1952.

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